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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 652.

STERLING CARR, Trustee in Bankruptcy of Nippon Yusen Kaisya,

Petitioner,

against

ELLIOTT V. BELL, Superintendent of Banks of the State of New York,

Respondent.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

Facts.

Upon the *ex parte* application of the trustee, based on his petition verified July 2, 1943 (R. 4), an order was granted by the District Court on July 13, 1943 (R. 2) for the ancillary examination of the Superintendent of Banks of the State of New York under section 21a of the Bankruptcy Act. Said petition stated that the trustee had been authorized "to commence proceedings to recover certain sums of money illegally deposited in The Yokohama Specie Bank, Ltd. at its office in New York City, during the year 1941, and to recover interest on certain bonds in the possession of your petitioner formerly belonging to the Bankrupt herein" (R. 4); that the Superintendent of Banks of the State of New York took possession of the

business and property in New York of The Yokohama Specie Bank, Ltd. on December 8, 1941, and is liquidating the same pursuant to the Banking Law of the State of New York (R. 5); that said Yokohama Specie Bank, Ltd. was at the time of the Superintendent's taking possession indebted to the Bankrupt in the sum of approximately $142,000 (R. 5); that the trustee had filed two proofs of claim with the said Superintendent for the moneys claimed to be due to the Bankrupt and that the Superintendent had rejected said claims (R. 5); that the trustee was about to institute suit against the Superintendent to sustain the said claims (R. 5); that the trustee deemed it necessary to examine the Superintendent and the books and records in his possession in order to establish the said claims (R. 6); and that the trustee in order to establish said claims also desired to examine the Guaranty Trust Company of New York with reference to a "deposit" of $150,000 by the Bankrupt with The Yokohama Specie Bank, Ltd. on July 17, 1941 and thereafter deposited by The Yokohama Specie Bank, Ltd. with Guaranty Trust Company (R. 6, 7).

Thereafter on July 13, 1943, the trustee commenced an action in the United States District Court, Southern District of New York, against the New York Agency and the Superintendent as liquidator (R. 16) to recover on the two said claims, one for $140,000, being the alleged balance of the alleged deposit on July 17, 1941, and one for $1,855.00, being the amount of interest claimed to be owing by the New York Agency as fiscal agent for certain obligors on bonds of the bankrupt held by the trustee (R. 19). In the complaint the illegality of the alleged "deposit" of $150,000 with the said New York Agency was stated to consist of a violation of a proclamation of

the President of the United States expressly prohibiting all transactions in foreign exchange or transfer or dealing with any property by any person in the United States with a National of the Empire of Japan (R. 16). On January 4, 1944 the action was dismissed for lack of jurisdiction on motion of the Superintendent (R. 16).

The Superintendent of Banks thereafter moved by petition (R. 12-20) and notice of motion served on the trustee's attorneys (R. 10, 11) for an order vacating the order for examination and quashing the subpoena issued pursuant thereto, upon the ground that the allegations in the petition of the trustee purporting to establish reasonable cause for said examination are wholly fictitious and false as matter of law.

The Superintendent invoked judicial notice that Executive Order 8832, the first so-called "Freezing Order" affecting Japan, was signed and published by the President on July 26, 1941, nine days after the "deposit" on July 17, 1941, alleged to have been made in violation thereof (R. 16, 17). The Superintendent also showed that the New York Agency of The Yokohama Specie Bank, Ltd. was not a bank of deposit and that no deposit account with the bankrupt or with any other person appeared in the books or records of the Agency (R. 17).

The trustee submitted an affidavit in opposition which purported to outline an alleged scheme between the bankrupt and the Yokohama Specie Bank, Ltd. "so as to make it appear that the Bankrupt's funds were transferred to Japan while actually the moneys deposited by the Bankrupt in the Yokohama Specie Bank, Ltd. were always available to the Bankrupt and were never transferred to Japan" (R. 24). The details of this affidavit are discussed in Point III.

After full argument in open court, the Superintendent's motion was granted, the order for his examination vacated and the subpoena quashed (R. 29, 30). On appeal, the Circuit Court of Appeals affirmed the order of the District Court (R. 36-38, 48). The present application for a writ of certiorari ensued.

Summary of Argument.

The respondent contends that the order appealed from was discretionary; that when it was made to appear to the Court that the special reasons assigned for the necessity of the examination in the trustee's petition were false as matter of law and upon judicial notice, the Court, in the exercise of a sound discretion, properly vacated the *ex parte* order and denied the examination; that no actual special cause for the examination of the Superintendent having been shown, either by the trustee's petition or by the affidavit submitted on his behalf (R. 21-28), the refusal of an order for examination was not an abuse of discretion requiring correction by the Circuit Court of Appeals or by this Court.

To make the respondent's position clear we deem it appropriate to refer to certain contentions which the Superintendent does not urge and has not advanced, but which seem to be suggested by the cases cited in petitioner's brief. That an action was to be brought; or that the examination was sought to obtain information in support of such contemplated action; or that such action was pending; or that it had been dismissed; or that the Superintendent claimed there was no merit to such action; or that he denied the facts alleged in the petition of the trustee on which the order for examination was granted, is not urged as reason for denying the trustee the examination. Respondent con-

cedes that none of such matters will, as a matter of law, defeat the right of examination under Section 21a, and has never argued to the contrary.

The respondent's argument here, as below, is that the petition of the trustee and the opposing affidavit, when tested in the light of judicial notice, and independently of any allegations or denials of fact by the Superintendent, not only fail to meet the requirement that some cause should be shown for the examination of a third party, but, on the contrary, show affirmatively that the examination could not tend to serve the purposes of Section 21a.

POINT I.

The decision of the Circuit Court of Appeals is not in conflict with any decision of this Court or of any Circuit Court of Appeals.

Petitioner suggests (p. 5) as a reason for granting the writ that the decision of the Circuit Court of Appeals "is probably in conflict" with the decision of this Court in *Cameron* v. *U. S.*, 231 U. S. 710, and "is in conflict" with decisions in the third, sixth and tenth Circuits rendered in *Matter of Eastern Utilities Investing Corporation* (C. C. A. 3rd), 98 Fed. 2nd 620; *Travis* v. *United States* (C. C. A. 10th), 123 Fed. 2nd 268; *Ulner* v. *United States* (C. C. A. 6th), 219 Fed. 641, Cert. Den. 238 U. S. 638 (Pet., p. 5).

None of these cases is in point. In *Cameron* v. *U. S.*, *supra*, the sole bankruptcy question involved was whether an examination in 21-a could be ordered before adjudication and the Court answered in the affirmative.

In *Matter of Eastern Utilities Investing Corporation*, *supra*, an order for examination had been granted by the District Court after full argument. The Circuit Court of

Appeals held that the granting of the examination was not an abuse of discretion and affirmed. There is nothing in the opinion to indicate that if the District Court had refused to allow the examination, the Circuit Court would have reversed.

In *Travis* v. *United States, supra,* the plaintiff in error was convicted of perjury for testifying falsely in a 21a examination in her husband's bankruptcy proceedings. The Circuit Court of Appeals held that the bankruptcy court had jurisdiction to order the examination and that her testimony was material. No question of discretion was involved or discussed.

In *Ulmer* v. *United States, supra,* the plaintiff in error had been convicted of perjury for testifying falsely in a 21a examination. "The right and power of the referee to make the order were not challenged, but Ulmer appeared and submitted to the examination" (at p. 644).

Petitioner fails to cite any decision by this or any other Court holding that the grant or refusal of an order of examination under Bankruptcy Act, Section 21a, is not discretionary; or which conflicts with the rule, announced in *In re Abbey Press* (C. C. A. 2nd) 134 Fed. 51 (*infra,* p. 8), and followed in the opinion the Circuit Court of Appeals below (R. 37) that an order for the examination of a witness, other than the bankrupt, should be for special cause shown, the sufficiency of which it is within the discretion of the Court to decide in each particular case.

POINT II.

The Circuit Court of Appeals properly held that the order of the District Court was within its discretion.

Many decisions, including all of the cases cited by petitioner, sustain the unquestioned rule that the grant or refusal of an order for examination under Section 21a rests in the sound discretion of the Court, and that such discretion will not be set aside except for abuse. [In re *Abbey Press,* 134 Fed. 51, cert. den. 196 U. S. 642, *In re Nesbitt, Limited,* 282 Fed. 265 *and R. J. Reynolds Tobacco Co.* v. *A. B. Jones Co.* 54 Fed. (2nd) 329].

There is no quarrel between the parties as to the rule. The trustee, however, seeks to limit its application to the action of District Court in granting the *ex parte* order. In Point II of his brief (p. 16) petitioner argues as if all of the matters which were before the District Court on the motion to vacate, and which appear in the record before this Court, had been presented and considered on the *ex parte* application. By this relation back theory the trustee attempts to remove all consideration of discretion in the District Court to refuse the examination and seeks to transfer to the Superintendent the burden of proving an abuse of discretion.

It is captious to contend that the perfunctory granting of the *ex parte* order for the examination of the Superintendent, on the basis of the unopposed and unexplained allegations in the trustee's petition, involved an exercise of discretion which could be set aside only for abuse. In the actual and accepted practice of the judges of the Southern District of New York, a motion to vacate such *ex parte* order is regularly heard by the judge holding motion term and is not referred to the judge who made the order. Such

motion is treated, in effect, as the equivalent of a litigated application on notice for the examination. The motion term judge does not presume to review an exercise of discretion by the judge who signed the *ex parte* order nor does the latter consider the hearing of the motion by the former in any such light. In this respect the Circuit Court of Appeals stated (R. 37, 38):

> "The claim that the original *ex parte* order could itself be vacated only upon demonstration of an abuse of discretion has no substance here; district court procedure is obviously to treat the hearing on motion to vacate as the real trial on the merits, and the appeal brings the whole proceeding before us for review."

To the same effect see *In re A. & W. Nesbitt, Limited,* 282 Fed. 265; *In re Union Mort. Inv. Co.,* 25 Fed. Supt. 468.

The sole question here, accordingly, is whether the order of the District Court denying the examination was an abuse of discretion.

POINT III.

The trustee's application to examine the Superintendent having been based on a misconception of the effective date of Executive Order 8832, and no actual cause for such examination having been shown, the Circuit Court of Appeals properly held that the District Court did not abuse its discretion in vacating the *ex parte* order and denying the examination.

In the case of *In re Abbey Press,* 134 Fed. 51, cert. den. 196 U. S. 642, the Circuit Court of Appeals of the Second Circuit declared the rule governing the grant or refusal of an order for the examination of a third party under Section 21a of the Bankruptcy Act as follows:

> "Any order for the examination of any witness other than a bankrupt, whether on first or second examination, should be for a special cause shown; but the authorities cited show that it has been uniformly held that it is within the discretion of the referee to decide in each particular case what cause is sufficient, and upon what information he will make the order. It must be held, therefore, that the grant or refusal of the order is a matter intrusted by law to the discretion of the court; the referee being in the present instance the court" (p. 56).

The attempts of the trustee to show special cause for the examination of the Superintendent revolve around a payment of $150,000 to the New York Agency of The Yokohama Specie Bank, Ltd. made by the Bankrupt on July 17, 1941.

The trustee first claimed, in his petition on the *ex parte* application to examine the Superintendent, that "sums of money (had been) illegally deposited in The Yokohama Specie Bank, Ltd. at its branch in New York City, during the year 1941" (R. 4). The claims filed with the Superintendent, and the complaint in the action brought by the trustee, show that the illegality claimed was an alleged violation of the proclamation of the President of the United States prohibiting certain transactions with any national of the Empire of Japan (R. 16). The Superintendent invoked judicial notice that Executive Order 8832, the first "Freezing Order" affecting Japan, was signed and published by the President on July 26, 1941, nine days after the "deposit" on July 17, 1941. It is clear, therefore, that the special cause sought to be shown for the *ex parte* order was based on the belief of the trustee that a law had been violated which was not in existence at the time of the transaction. The trustee has abandoned any contention that the $150,000 transaction involved a violation of Executive Order 8832

and does not now rest his showing for examination upon the ground of "illegal deposits" advanced in his petition.

In the affidavit submitted in opposition to the motion to vacate the trustee advances a further theory for the necessity or propriety of examining the Superintendent. He outlines an alleged "scheme" between the bankrupt and The Yokohama Specie Bank, Ltd. under which money was "deposited" in an agency in this country "so as to make it appear that the Bankrupt's funds were transferred to Japan while actually the moneys deposited by the Bankrupt in The Yokohama Specie Bank, Ltd. were always available to the Bankrupt and were never transferred to Japan" (R. 24). The "scheme" is described in detail (R. 24-26) and upon it the trustee now depends for a showing of special cause for the examination.

The trustee himself exposes the alleged scheme as a figment of the imagination. In his enumeration of the steps followed in the execution of the alleged plot not to transmit funds to Japan the trustee proves affirmatively and conclusively, as a matter of law and of judicial notice, that there was an effective and bona fide transmittal. No preliminary consideration of the merits of the claim is required. The sole question is whether it is an abuse of discretion for the court to refuse an examination of a third party where the special cause asserted is a contradiction in terms.

The matters stated in the affidavit to have been discovered by the trustee (R. 24-26) and urged as reasonable cause to believe the existence of the "scheme" are matters of every day international banking business. The example of the transactions by the bankrupt with the California Agency is offered by the trustee. Money was delivered to The Yokohama Specie Bank (California Branch) which issued a certificate of temporary deposit and then cabled the receipt of this deposit to its head office in Tokyo and

at the same time the California Agency placed in its Account Book entitled "Foreign Exchange" the item of the receipt in terms of Yen; the Bank in Tokyo confirmed the receipt of the cable, sometimes by cable and at all times by "advice of transfer"; the original certificate was kept in custody in Tokyo (R. 25). The books of the California branch would show a clearance to Tokyo each day and a reduction in the balance due Tokyo from California (R. 25).

Up to this point no one would contend that anything took place except the everyday procedure of transmitting funds by cable from the United States to Japan. The trustee certainly does not wish to be understood as contending that a telegraphic transfer of funds is not effective. He surely does not mean that currency must be mailed or physically transported.

The trustee assumes, however, to show unmistakable evidence of the "scheme" when he proceeds to discuss how the funds were made "available" to the bankrupt in the United States (R. 25). "The bankrupt would deliver a letter asking for a certain sum of money and a temporary certificate of deposit which it had in its possession. The records of The Yokohama Specie Bank would show that they did telegraph to Tokyo presumably to have this amount of money returned upon a certain date. The Yokohama Specie Bank at Tokyo would then send a telegraphic cable presumably wiring the money which again would result in debit and credit entries on both sides of the books of The Yokohama Specie Bank both in California and in Tokyo. The moneys that were returned to California were always in dollars and not in Yen and not at the rate of exchange on the date on which they were alleged to have been returned although the rate of exchange would vary each day and the moneys alleged to have been returned were always the exact sum of dollars deposited" (R. 25-26).

The trustee further argues that the fact that the New York Agency of The Yokohama Specie Bank, Ltd. issued its check to the bankrupt in the sum of $40,000 on July 25, 1941, and that the Superintendent of Banks has listed said $40,000 as an account payable to the holder of the check and allowed it as a valid debt against the New York Agency (R. 27), is proof that the $150,000 "deposited" by the bankrupt on July 17, 1941, was not transferred to Japan.

The fact that funds transmitted to Japan were subsequently made "available" in dollars to the bankrupt in the United States proves nothing, of course, against the actuality of transfer; but, beyond that, the method of making the funds "available" described by the trustee is so unequivocally referable to an actual transmittal as to be meaningless without it. It not only fails to support suspicion of the alleged scheme, it dispels the illusion under which the claim is made.

The Courts take judicial notice of matters of common knowledge in banking practice. (*National Surety Co.* v. *McCormick,* 268 Fed. 185; *Stockyards Nat. Bank of St. Paul, Minn.* v. *First Nat. Bank of Towner,* N. D., 249 Fed. 421; *Republic Supply Co. of Cal.* v. *Richfield Oil Co. of Cal.,* 79 Fed. (2nd) 375; *Harriman Nat. Bank* v. *Commissioner of Internal Revenue,* 43 Fed. (2nd) 950; *Ali* v. *Haff,* 114 Fed. (2nd) 369; *U. S.* v. *National City Bank of New York,* 40 F. Supp. 99). The court below, accordingly, could properly take judicial notice that the steps outlined by the trustee as basis for a belief in the existence of the alleged "scheme" are nothing but the everyday methods followed in international banking transactions and actually refute the claim of a scheme.

The attempts of the trustee to show special cause for an examination of the Superintendent are without substance.

They do not meet the requirement set forth in *In re Abbey Press, supra.* No reason has been advanced which would indicate that the examination would tend to serve the purposes of Section 21a.

The discretion of the Court is as broad to refuse as to grant an examination. It cannot be an abuse of discretion to follow the rule that special cause should be shown for the examination of a third party, and to refuse the examination when the expressly stated reason for it is to support claims which are disclosed by the trustee's statement of them to be based upon misconception of law and common banking practice, and are further shown to be incapable of support through the examination sought.

It is respectfully submitted that the refusal of an order for the examination of the Superintendent of Banks of the State of New York in the circumstances disclosed by the record was the exercise of a sound judicial discretion and that the decision of the Circuit Court of Appeals was therefore correct.

Conclusion.

For the foregoing reasons it is respectfully submitted that the application for the writ should be denied.

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